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Carol L. Bjelland
Director
Regulatory Matters

March 22, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

RE: EX PARTE: GN DOCKET No. 93-252

Dear Mr. Caton:

This letter shall serve as notification that the attached letter and accompanying legal analysis were provided to Mr. John Cimko of the Commission's Wireless Telecommunications Bureau. The legal analysis provides a comparison of the forbearance standards set forth in Sections 332 and new Section 10(a).

Please include this letter, and all corresponding attachments, in the record of this proceeding in accordance with the Commission's rules concerning ex parte communications.

Questions concerning this matter should be directed to the undersigned.

Sincerely,

Carol L. Bjelland

Attachment

C: R. Allen
N. Boocker
K. Brinkmann
J. Cimko
T. May

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Carol L. Bjelland
Director
Regulatory Matters

March 22, 1996

GTE Service Corporation
1850 M Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 463-5292

Mr. John Cimko
Chief-Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N. W. - Room 5202
Washington, D. C. 20554

RE: GN Docket No. 94-33: Further Forbearance-TOCSIA

Dear Mr. Cimko:

On March 1, 1996, I met with you, Nancy Boocker and Tim May to discuss GTE's position concerning FCC forbearance from applying TOCSIA to CMRS providers as raised and addressed in the above-referenced proceeding. In the course of this discussion, a question arose as to the standard to be used to determine whether forbearance is appropriate under Section 10(a) of the Telecommunications Act of 1996.

Attached to this letter you will find a legal analysis which compares the forbearance standard set forth in Section 332 of the Communications Act and new Section 10(a) of the 1996 Act.

If you have questions concerning this analysis, or wish to discuss this matter further, please contact me at 463-5292.

Sincerely,

A handwritten signature in black ink, appearing to read "Carol L. Bjelland".

Carol L. Bjelland

Attachment

C: R. Allen
N. Boocker
K. Brinkmann
T. May

**THE FCC MAY CONCLUDE THE PENDING
CMRS REGULATORY FORBEARANCE PROCEEDING
WITHOUT ISSUING A FURTHER NOTICE**

This paper provides a comparison of the forbearance standard set forth in Section 332(c)(1)(A) of the Communications Act and the standard to be used to determine whether forbearance is appropriate under new Section 10(a) of the Act. As detailed herein, the two sections and the analysis prescribed in each are essentially identical, except that Section 10(a) is more favorable for forbearance. As such, GTE submits that the record generated in response to the Commission's existing notice of proposed rule making in the *Further Forbearance*¹ proceeding remains valid despite the adoption of Section 10(a), and that the Commission may take final action deciding to forbear from enforcement of the Title II provisions under consideration in the *Further Forbearance* proceeding, including the Telecommunications Operator Consumer Services Improvement Act (TOCSIA), without issuing a further notice.²

¹ Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, 9 FCC Rcd 2164 (1994) (Notice of Proposed Rule Making).

² The issue of forbearance from enforcement of TOCSIA for CMRS operators was also raised in GTE's petition for reconsideration of the *CMRS Second Report and Order*. See GTE Service Corp., Petition for Reconsideration or Clarification, GN Docket No. 93-252 (filed May 19, 1994) (urging the Commission to forbear from applying TOCSIA requirements to CMRS providers).

Section 332(c)(1)(A) of the Communications Act gives the Commission discretion to forbear from applying the provisions of Title II, with the exception of Sections 201, 202, and 208, to certain CMRS providers if the Commission finds that the following three conditions exist:

- (1) that enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) that enforcement of such provision is not necessary for the protection of consumers; and
- (3) that specifying such provision is consistent with the public interest.³

New Section 10(a) of the Communications Act provides that, "[n]otwithstanding Section 332(c)(1)(A) . . . the Commission shall forbear from applying any regulation or provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets" if the Commission finds that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers;
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

³ 47 U.S.C. §§ 332(c)(1)(A)(i), (ii), (iii).

Under both provisions, the Commission is directed to consider whether forbearance will promote competitive market conditions.⁴ Section 332(c)(1)(C) also states that, "[i]f the Commission determines that such regulation (or amendment) [providing that certain provisions of Title II are inapplicable] will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest." Similarly, Section 10(b) states that, "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest."

The primary difference between the two provisions is that Section 332(c)(1)(A) gives the Commission *discretion* to determine that any provision of Title II may be forborne from if the three conditions are met. In contrast, Section 10(a) states that the Commission *shall forbear* if the three criteria set forth in that statute are met. In addition, although Section 332(c)(1)(A) only allows the Commission to forbear from applying certain provisions of Title II to CMRS providers, Section 10(a) requires the Commission to forbear from applying "any regulation or any provision of [the] Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or

⁴ See 47 U.S.C. § 332(c)(1)(C); 47 U.S.C. § 10(b).

their geographic markets" if the three criteria are met.⁵ As such, Section 10(a) is more expansive in terms of both the provisions to which it applies as well as the entities to which it extends. The three prongs under Sections 332(c)(1)(A) and Section 10(a) are essentially identical -- the only difference being that Section 10(a)(1) contains more expansive language referring to "the charges, practices, classifications or regulations by, for, or in connection with *that telecommunications carrier or telecommunications service*" (emphasis added) while Section 332(c)(1)(A) refers to the "charges, practices, classifications, or regulations for or in connection with *that service*" (emphasis added).

The Commission's obligation to issue a further notice before concluding the *Further Forbearance* proceeding turns on the adequacy of the notice given in the agency's original NPRM and how the sufficiency of that notice and the opportunity for comment that it afforded is affected -- if at all -- by the adoption of Section 10(a). The Administrative Procedure Act generally requires notices of proposed rule making to include: (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects

⁵ The Act defines "telecommunications carrier" as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services. . . . "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used."

and issues involved.⁶ Here, the seminal question is whether the adoption of Section 10(a) altered the terms or substance of the forbearance inquiry, requiring a new notice to be issued.

In the *Further Forbearance* proceeding, the Commission asked commenters to discuss (1) how the Section 332(c)(1)(A) test and the cost/benefit analysis associated with the last prong applies to each remaining Title II provision,⁷ (2) how forbearance from each remaining provision would enhance future CMRS competition, (3) how Congressional intent underlying the Title II provision would be affected, (4) how forbearance for particular types of CMRS providers would comport with regulatory symmetry, and (5) whether there are other factors or alternatives to be considered in classifying CMRS providers for further forbearance purposes. Comment was also solicited on the extent to which regulatory concerns regarding rates, practices, and consumer protection interests might be jeopardized by further forbearance for small providers, how the Commission should compare the benefits of applying the remaining provisions of Title II versus the benefits of further forbearance, and on whether certain

⁶ See 5 U.S.C. § 553(b).

⁷ In the *CMRS Second Report and Order*, the Commission decided to forbear from applying Sections 203, 204, 205, 211, 212, and 214 to any service classified as CMRS. The Commission concluded that the remaining sections of Title II should be enforced to promote competition in the CMRS marketplace or to protect consumers, but announced that it would consider forbearing from these provisions after a more extensive record had been compiled. As mentioned, GTE filed a petition for reconsideration of the Commission's decision in the *CMRS Second Report and Order* declining to forbear from enforcement of Section 226, TOCSIA. See GTE Service Corp., Petition for Reconsideration or Clarification, GN Docket No. 93-252 (filed May 19, 1994). See also *supra*, n.2.

statutory provisions impose undue costs on specific types of providers without producing benefits to the public.⁸

With respect to TOCSIA, the Commission solicited comment on whether forbearance is justified for particular classes of CMRS providers. The Commission directed parties advocating forbearance for particular classes to explain how forbearance would meet the three-pronged statutory test. In connection with the first two prongs, commenters were asked to discuss how the requirements that rates be just and reasonable and that consumers are adequately protected would be met. In connection with the third prong, commenters were asked to address whether TOCSIA imposes any costs that would be exceptionally difficult for certain types of CMRS providers and whether forbearance in such a case would significantly diminish statutory protections for the public.⁹

The scope of the Commission's inquiry in the *Further Forbearance* notice was extremely broad, leaving few additional issues to be addressed in a further notice as a result of the adoption of Section 10(a). Relatedly, because the three-pronged tests for forbearance under Section 332(c)(1)(A) and Section 10(a) are virtually identical, it is difficult to conceive of any questions arising under the three prongs that were not asked in the Commission's existing notice that might be asked in a further notice necessitated by the adoption of Section 10(a). If anything, the *Further Forbearance* notice asks

⁸ Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, 9 FCC Rcd at 2165-66.

⁹ *Id.* at 2169.

more questions than would be required under Section 10(a) because Section 332(c)(1)(A) gives the Commission more discretion.¹⁰

At the same time, Section 10(a) is more favorable for forbearance because it directs the Commission to forbear if the three-pronged test is met and requires forbearance for particular *carriers* if the test is satisfied. Similarly, Section 10(a) permits forbearance in any or some geographic markets. The *Further Forbearance* notice did not solicit comment, in the section dealing with TOCSIA or any other section, on forbearance for particular carriers or individual geographic markets, nor did the notice provide any indication that forbearance for particular carriers or in specific geographic markets was being contemplated. An inquiry under Section 10(a) would appear to require notice and comment on these issues.¹¹ However, if the Commission

¹⁰ In pleadings and *ex parte* submissions, GTE and other entities participating in the *Further Forbearance* proceeding have submitted factual information addressing each of the three prongs of the statutory standard.

¹¹ See *Small Ref. Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 546 (D.C. Cir. 1983) ("Agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking."). An agency may adopt final rules that differ from those proposed as long as the final rules are the "logical outgrowth" of the agency's proposals. See, e.g., *Shell Oil Co. v. EPA*, 950 F.2d 741, 747 (D.C. Cir. 1991); see also *Complex Horsehead Resource Dev. Corp. v. EPA*, 16 F.3d 1246, 1266 (D.C. Cir. 1994). Although it is not clear that the "logical outgrowth" test would be applied here, where the intermediate passage of a new statutory provision has given the agency new regulatory options, the "logical outgrowth" analysis is the closest line of cases we have been able to uncover. Consistent with the analysis in this memorandum, a final rule is generally deemed to be the logical outgrowth of a proposed rule if a new round of notice and comment would not offer commenters "their first occasion to offer new and different criticisms which the agency might find convincing." *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (citations and quotations omitted).

decides to forbear from enforcing any of the remaining Title II provisions at issue in the *Further Forbearance* proceeding as applied to all CMRS providers, the lack of a record with respect to the agency's obligation to forbear for particular carriers or in specific geographic markets will not be an issue -- the Commission will already have given CMRS operators all of the relief available to them under Section 10(a). The adoption of Section 10(a) only poses a notice problem if the Commission fails to afford a carrier an opportunity to show that it could have made a case for forbearance under the new standard.

The Commission's ability to apply the Section 10(a) standard in completing that portion of the *Further Forbearance* proceeding dealing with forbearance from enforcing TOCSIA also depends on the adequacy of the record and whether the inquiry under Section 10(a) is deemed sufficiently similar to render a record generated under Section 332(c)(1)(A) of continuing validity. That portion of the *Further Forbearance* notice soliciting comment on forbearance from TOCSIA focussed on whether forbearance is appropriate for particular classes of CMRS operators. Again, comment was not sought with respect to particular carriers or particular geographic markets. Nevertheless, the Commission's obligation to issue a further notice will depend on whether the agency intends to forbear. If the Commission declines to forbear from enforcing TOCSIA for all CMRS operators or for a particular class, there might be some argument that a different result could have been reached if individual carriers had an opportunity to present their case in light of Section 10(a). On the other hand, if the Commission

decides to forbear entirely under the discretionary Section 332(c)(1)(A) standard, there will be no room for such a complaint.¹²

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¹² Section 10(a) did not replace or supplant Section 332(c)(1)(A). Nevertheless, the exact language of Section 10(a) states that, "[n]otwithstanding Section 332(c)(1)(A), . . . the Commission shall forbear" if the test under Section 10(a) is met. This indicates that, regardless of any determination made by the Commission in its discretion under Section 332(c)(1)(A), if the Commission determines that the test under Section 10(a) has been satisfied, it must forbear. Section 10(c) of the Act allows any telecommunications carrier or class of telecommunications carriers to submit a petition to the FCC, requesting the agency to exercise its authority under Section 10(a) with respect to that carrier or carriers. Such a petition is deemed granted if the Commission does not deny it, within one year after the agency receives it, for failure to meet the three criteria, unless the one-year period is extended by the Commission.